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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

JACOB MANDEL, et al.

Case No. 3:17-CV-03511-WHO

Plaintiffs,

VS.

BOARD OF TRUSTEES of the CALIFORNIA
STATE UNIVERSITY, SAN FRANCISCO
STATE UNIVERSITY, et al..

Defendants.

JOINT STATEMENT RE DISCOVERY DISPUTE

Complaint Filed: June 19, 2017
First Am. Complaint Filed: August 31, 2017

Judge: Hon. William H. Orrick
Dept: Courtroom 2, 17th Floor

1 Plaintiffs Jacob Mandel, et. al. (“Plaintiffs”) and Defendants Board of Trustees of the
 2 California State University, San Francisco State University, et al. (the “Administration Defendants”)
 3 (together, the “Parties”) submit this Joint Statement pursuant to this Court’s Standing Order for Civil
 4 Cases (“Standing Order”) to address a discovery dispute that has arisen. Plaintiffs served their First
 5 Request for Production of Documents from Administration Defendants (Nos. 1-4) on the
 6 Administration Defendants on October 26 (re-sending the same set on November 9, 2017). The
 7 Administration Defendants have not responded to the discovery requests, other than to advise
 8 Plaintiffs’ counsel by email that they believe no response is currently required because, according to
 9 the Administration Defendants’ counsel’s email, “where a complaint is dismissed for failure to state
 10 a claim, the plaintiff is not entitled to discovery.” The parties’ respective positions are set forth
 11 below.

12 **1. Plaintiffs’ Position**

13 Plaintiffs attempted to meet and confer with the Administration Defendants regarding their
 14 failure to submit any responses or objections to the First Request for Production of Documents. On
 15 December 26, 2017, lead counsel for the Administration Defendants stated that he was out of the
 16 office, “but in any event I do not see a need to meet and confer in light of the clear holding of Iqbal.”

17 Under Federal Rule of Civil Procedure 26, once the initial discovery conference has taken
 18 place, discovery may begin. Fed. R. Civ. P. 26(d). Here, the parties completed their initial
 19 discovery conference months ago, and, also months ago, Plaintiffs served on the Administration
 20 Defendants a First Request for Production of Documents that has four requests. To date, the
 21 Administration Defendants have failed to respond.

22 Of course, “[t]he general rule [is] that discovery may proceed while motions to dismiss are
 23 pending.” Gideon Mark, *Federal Discovery Stays*, 45 U. MICH J. L. REFORM 405, 409-10 (2012).
 24 This makes sense because the “Federal Rules of Civil Procedure do not provide for automatic or
 25 blanket stays of discovery when a potentially dispositive motion is pending.” *Ministerio Roca*
Solida v. United States Dep’t of Fish & Wildlife, 288 F.R.D. 500, 502 (D. Nev. Jan. 14, 2013); *see*
also Ciuffitelli v. Deloitte & Touche LLP, 2016 WL 6963039, at *4 (D. Or. Nov. 28, 2016)
 26 (“[d]istrict courts in [the Ninth Circuit] have rejected the general proposition that a pending
 27
 28

1 dispositive motion justifies a stay of discovery”).

2 Relying on *Iqbal*, and quoting from it selectively below, the Administration Defendants
 3 contend the rule is otherwise. They are wrong. As one court has explained where a defendant
 4 moved for a stay of discovery, “*Twombly* and *Iqbal* do not dictate that a motion to stay should be
 5 granted every time a motion to dismiss is placed before the Court.” *Tamburo v. Dworkin*, 2010 WL
 6 4867346, at *1 (N.D. Ill. 2010). If *Twombly* and *Iqbal* do not dictate that a stay should be granted
 7 every time a defendant files a motion to dismiss, they cannot support the position that where a
 8 motion to dismiss is pending, a defendant can simply ignore discovery. That the Court has indicated
 9 that it will grant the pending motions to dismiss does not change the analysis because the Court is
 10 going to give Plaintiffs leave to amend. Transcript of Proceedings, November 8, 2017 at 33:17,
 11 37:17. Moreover—and as the Court already has recognized—when this case moves forward it will
 12 be on a compressed deadline. *Id.* at 37:21-38:4. Further, even if the Administration Defendants’
 13 position had merit—which it does not—their failure to respond to the Rule 34 request within the
 14 time permitted *waived all objections* to that request. *Richmark Corp. v. Timber Falling Consultants*,
 15 959 F.2d 1468, 1473 (9th Cir. 1992). Therefore, the Court should enter an order that the
 16 Administration Defendants must respond to the document requests served months ago.

17 2. **Defendants’ Position**

18 Plaintiffs have omitted from their discussion – and refused to include in the joint statement at
 19 the beginning of this document – the fact that, before any discovery responses would have been due,
 20 this Court ruled that Plaintiffs have not stated a claim for relief and that the amended complaint
 21 should be dismissed. On November 8, 2017, the Court held that it would grant the Administration
 22 Defendants’ motion to dismiss the entire complaint with leave to amend and took the Case
 23 Management Conference off calendar. No amended complaint has been filed. When Plaintiffs’
 24 counsel sought to meet and confer regarding Plaintiffs’ discovery requests, Defendants’ counsel
 25 advised Plaintiffs’ counsel that no responses were required in light of the Court’s ruling on the
 26 motion to dismiss and the holding in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), that, when a plaintiff
 27 has failed to state a claim, he is not entitled to discovery. When Plaintiffs’ counsel sought to meet
 28 and confer further, Defendants’ counsel stated that, in light of *Iqbal*, no further meet-and-confer was

1 necessary.

2 The authorities Plaintiffs cite to support their position are irrelevant, as they address whether
 3 and when discovery is allowed while a motion to dismiss is pending but has not been decided. The
 4 authorities do not address whether discovery is allowed after a court has held, as the Court has here,
 5 that a motion to dismiss should be granted because plaintiffs have failed to state a claim. The
 6 Supreme Court held in *Iqbal* that, when a plaintiff has failed to state a claim for relief, “he is not
 7 entitled to discovery, cabin or otherwise.” 556 U.S. at 686. The Ninth Circuit has expressly found
 8 that *Iqbal* means “that plaintiffs must satisfy the pleading requirements of Rule 8 *before* the
 9 discovery stage, not after it.” *Mujica v. AirScan, Inc.*, 771 F.3d 580, 593 (9th Cir. 2014) (emphasis in
 10 original); *see also id.* at 593 n.7 (“To the extent that any [out-of-circuit] decision[] suggests that that
 11 courts retain discretion to permit discovery whenever a plaintiff has failed to satisfy Rule 8’s
 12 plausibility standard, it is simply incompatible with *Iqbal* and [*Bell Atl. Corp. v. Twombly*, 550 U.S.
 13 544 (2007)].”).

14 Moreover, the Ninth Circuit has made clear that, even while a motion to dismiss is still
 15 pending, “[d]iscovery is only appropriate where there are factual issues raised by a Rule 12(b)
 16 motion.” *Jarvis v. Regan*, 833 F.2d 149, 155 (1987). Where, as here, a district court has accepted as
 17 true the factual allegations in a complaint but found them deficient as a matter of law, the “complaint
 18 d[oes] not raise factual issues that require[] discovery for their resolution.” *Id.*; *see also Wagh v.*
 19 *Metris Direct, Inc.*, 363 F.3d 821, 829-30 (2003), *overruled on other grounds*, *Odom v. Microsoft*
 20 *Corp.*, 486 F.3d 541, 551 (9th Cir. 2007) (en banc); *Rae v. Union Bank*, 725 F.2d 478, 481 (9th Cir.
 21 1984).

22 If and when Plaintiffs file an amended complaint and the Court denies Defendants’ motion to
 23 dismiss, Defendants will respond appropriately to Plaintiffs’ discovery requests.

1 Dated: February 5, 2018

WINSTON & STRAWN LLP

2 By: /s/ Robb C. Adkins

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12 Dated: February 5, 2018

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18 BOARD OF TRUSTEES OF THE CALIFORNIA

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19 ANN BEGLEY, LUOLUO HONG, LAWRENCE

BIRELLO, REGINALD PARSON, OSVALDO

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STUART, ROBERT NAVA, MARK

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SHIMINA HARRIS

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23 filing of this document has been obtained from each of the other Signatories to this document.

24

25 /s/ Robb C. Adkins

26 Robb C. Adkins